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IN THE

Supreme Court of the United States

October Term, 1969

No. 1078

JOHN T. McCLAIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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JOHN T. McCLAIN,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of March 2, 1970, denying certiorari to the United States Court of Appeals for the Ninth Circuit, and that a writ of certiorari issue on question 1. presented in the petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The basis for this petition is a conflict between the circuits which has come to counsel's attention since the filing

of the petition for certiorari in this case. After the decision by the Ninth Circuit here, the United States Court of Appeals for the Seventh Circuit, in *United States v. Reynolds,* 416 F.2d 951 (7th Cir. 1969), reversed a conviction based upon identical facts.[1] This treatment of the same factual and legal situation in opposite ways by different circuits is, in counsel's opinion, of sufficient moment to warrant a reconsideration of the petition for certiorari, and to indicate the need for a reaffirmation of the *Street-Stromberg* line of cases.

In the instant case, petitioner waived his right to a trial by jury and waived findings of fact. The court found him guilty of possession of illegally imported marijuana (21 U.S.C. section 176a). There was some evidence that petitioner had actual knowledge that the marijuana was illegally imported, but, since there were no findings of fact, it is impossible to be sure that the judge did not rely on the presumption of knowledge which this Court struck down in *Leary v. United States,* 395 U.S. 6 (1969). While admitting that if this had been a jury trial and the jury had been instructed on the presumption the conviction could not stand, the Ninth Circuit, distinguishing trial by the court[2], affirmed the conviction. The Court said that "[o]n appeal, findings will be implied in support of the judgment if the evidence, viewed in the light most favorable to the Government, warrants them." 417 F.2d at 492. Thus, the Court of Appeals was not sure that the judge did not rely on the presumption, but decided to affirm anyway. It should

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1 The advance sheet copy of the Reynolds opinion was not received by counsel until December 16, 1969, and was thus unavailable when the research for the petition for certiorari was done.

2 It should be noted that the petitioner in Street v. New York, 394 U.S. 576 (1969), was tried by a judge and not a jury.

be noted that at the time of the trial the presumption was good law and there is nothing to indicate that a judge would consider evidence of actual knowledge of importation when there was, as far as he knew, a viable presumption to allow him to avoid that task. *Zaragoza v. United States,* 389 F.2d 468 (9th Cir. 1968); *Anthony v. United States,* 331 F.2d 687 (9th Cir. 1964); *Leary v. United States,* 383 F.2d 851 (5th Cir. 1967), *reversed* 395 U.S. 6 (1969); *United States v. Gibson,* 310 F.2d 79 (2d Cir. 1962).

In *United States v. Reynolds, supra,* 416 F.2d 951 (7th Cir. 1969), a case for all relevant purposes identical to *McClain,* the Seventh Circuit reached the opposite result to that of the Ninth Circuit in *McClain. Reynolds,* too, involved a trial to a judge, evidence of actual knowledge and the absence of findings of fact. In *Reynolds,* as in *McClain,* the government argued that there was substantial evidence to support the verdict. The Seventh Circuit, however, reversed. In a *per curiam* opinion, that court held that reversal was required by *Stromberg:*

> "In *Leary v. United States,* 395 U.S. 6, 89 S.Ct. 1532 (1969), the Court held the presumption in section 176a unconstitutional because there was no rational connection between possession of marihuana and knowledge that the marihuana was illegally imported. 395 U.S. 6, 29-54, 89 S.Ct. 1532. Here, however, the buyer of the marihuana testified that the defendant told him that the marihuana was Mexican in origin and that defendant showed him the Mexican newspaper in which the marihuana was wrapped. The Government argues that there is substantial evidence to support the conviction for violation of section 176a without relying on the presumption. Since the Dis-

trict Judge did not make findings and entered a general verdict, we do not know on what theory he based his conclusion. In *Stromberg v. California*, 283 U.S. 359 (1931), the Court held that a conviction based on alternate theories submitted to a jury must be set aside where one of the theories is unconstitutional. Although defendant here waived a jury trial and was convicted by the Judge, we do not think the result should be different. Therefore, we remand this case to the District Court for a finding as to whether there is sufficient evidence to prove defendant guilty beyond a reasonable doubt of violating section 176a without relying on the presumption."

United States v. Reynolds, supra, 416 F.2d at 952.

Petitioner respectfully contends that *Reynolds*[3] is the correct application of the law to the facts here and that the Ninth Circuit erred in the instant case. Petitioner suggests that the great number of cases which are tried to the court rather than to juries as a result of the crowded dockets in our District Courts makes the question presented here an important one.

CONCLUSION

For the foregoing reasons, petitioner prays that rehearing be granted upon question 1. in the petition for certiorari.

Respectfully submitted,[4]

BURTON MARKS

Counsel for Petitioner

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3 See also United States v. Brooks, 416 F.2d 459 (5th Cir. 1969): The trial judge filed findings of fact, so the Court could conclude that "the trial court found that the appellant transported the marijuana . . . into the United States of America. No reliance was had upon the presumption arising from possession."

4 Counsel acknowledges the assistance of Robert Mann and Steven Gilbert, third year law students of UCLA Law School, in the preparation of this petition.

C E R T I F I C A T E

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

BURTON MARKS

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MARCH , 1970, I served the within PETITION FOR REHEARING (No. 1078 - Oct. Term., 1969) on the following by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed as follows:

United States Attorney
Central District of California
12th Floor, U. S. Courthouse
Los Angeles, California 90012

Solicitor General of the United States
Washington, D. C.

U. S. Court of Appeals for the Ninth Circuit
Seventh & Mission Streets
San Francisco, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 copies to the Supreme Court of the United States, Washington, D. C.